



California Fair Political Practices Commission

August 24, 1989

Honorable Robert R. Diaz
Councilmember, City of Irwindale
5050 N. Irwindale Avenue
Irwindale, CA 91706

Re: Your Request for Advice
Our File Nos. A-89-425
and A-89-437

Dear Councilmember Diaz:

This is in response to your letter requesting advice concerning your duties as a city councilmember for the City of Irwindale and as a member of Irwindale's Redevelopment Agency under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} Pursuant to our telephone conversation of July 25, 1989, your two advice requests have been consolidated into this single response. Further, the additional question we discussed has been incorporated into this letter.

QUESTIONS

1. May you participate in city council and redevelopment agency decisions concerning the proposed development of property which is within 316 to 1,200 feet of property you own?
2. May you participate in city council and redevelopment agency decisions concerning the proposed purchase of quarries around your property, one of which may ultimately be developed into a sports stadium?
3. Will the creation of a blind trust with your niece or nephew as trustee permit you to participate in decisions concerning the property you own?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

CONCLUSIONS

1. You must disqualify yourself from participating in any decision concerning the Alpha I or II project areas that could foreseeably increase or decrease the fair market value of your property by \$10,000 or more, or the rental value of your property by at least \$1,000 in a 12-month period, unless (1) all the properties that are roughly the same distance away from the proposed project are similarly affected and the property owners constitute a significant segment of the population, or (2) the effect on the remainder of the population will be substantially the same as the effect on you.

2. You may participate in the stadium decisions if the effect on your real property will be substantially the same as the effect upon at least 25 percent of all the properties which are within a 2,500-foot radius of the boundaries of your property, or there are at least 10 properties under separate ownership within a 2,500-foot radius of your property.

3. Your niece or nephew may be the trustee of your blind trust consistent with the Act, provided the niece or nephew has no interest in the trust. However, the creation of a blind trust will not immediately remedy the conflicts of interest that currently confront you. You are obligated to continue to disclose the original assets and any income generated from those assets until they are disposed of by the trustee.

FACTS

The City of Irwindale has a population of 1,030 and covers 9.5 square miles. You are city councilmember in Irwindale and a member of the Irwindale Redevelopment Agency. Consequently, you are confronted, in your official capacity, with a variety of land use issues. You are also the owner of two parcels of land in Irwindale, each of which is valued over \$1,000. One parcel, designated lot 25, is solely owned by you. You also have a one-third interest in another parcel, designated lot 39. Currently these properties are zoned for commercial use, but leased for residential rental purposes on a month-to-month basis.

You have become concerned about potential conflicts of interest that may affect your ability to participate in city council and redevelopment agency decisions. Specifically you have become concerned about three project areas. The Alpha I project area is 316 feet away from your lots and is currently used by various automobile dismantlers. The Alpha II project area is 1,200 feet east of your lots and is zoned for light industrial uses. Alpha II has been vacated in anticipation of future light industrial development.

In addition, you are concerned about the stadium project which involves the purchase of several gravel quarries by a developer. You have informed us that most of the area will be developed for industrial and possibly some commercial uses. The closest quarry involved in the purchase is 1,200 feet northeast of your lots. The parcel that will be used for the stadium, should the need for the stadium arise, is 3,000 feet south of your lots. The developer may ultimately request city assistance in the purchase of the property.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. As a city councilmember and a member of the Irwindale Redevelopment Agency, you are a public official. (Section 82048.)

Section 87103 specifies that a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on:

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103(b) and (c).

According to the information you have provided, you own two parcels of land. Your financial interest in both lots is greater than \$1,000.^{2/} In addition, because you are currently leasing out

^{2/} You stated in your letter that the value of lot 39 was \$115,000, thus your one-third interest would be valued at least at \$38,333.

the property, your lessees are sources of income to you. Thus, your property and your lessees are potentially disqualifying financial interests as defined in Section 87103.^{3/} However, Section 87103 specifies that as a public official you have a financial interest in a decision only if it is reasonably foreseeable that the decision will have a material financial effect, on your property or source of income.

You have asked about a variety of different decisions. While under some circumstances a series of decisions may be too inter-related to be considered separately (Miller, No. A-82-119, copy enclosed), generally, most decisions must be analyzed independently to determine if there will be a foreseeable material financial effect on your real property. (In re Owen (1976) 2 FPPC Ops. 77, copy enclosed.)

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.)

Your Real Property Interests and the Alpha Project areas

As stated above, generally, each decision must be analyzed independently with respect to the foreseeability of a financial effect on your property, and the materiality of the effect. Thus, where a decision solely concerns a single lot in the Alpha I or Alpha II project areas, the distance considered for materiality purposes will be the nearest boundary of the lot that is the subject of the decision. Conversely, where the decision would affect the entire Alpha I or Alpha II area, the nearest boundary of the area affected would be the point from which to measure.

Your real property is within 316 feet of the Alpha I project area and within 1,200 feet of Alpha II project area. Subdivision (a) of Regulation 18702.3 provides guidelines as to whether the effect of a decision on the real property interest of a public official where the property is outside a radius of 300 feet, yet within a radius of 2,500 feet, is material. In these

^{3/} Since the information you provided only specifically referred to rental income from your property, we can only discuss your lessees as sources of income. Please note, however, that the provisions of the Act are also applicable to any other sources of income of \$250 or more in a 12-month period.

circumstances, the effect of the decision is material if the decision will have a reasonably foreseeable effect of:

(A) Ten thousand dollars (\$10,000) or more on the fair market value of the real property in which the official has an interest; or

(B) Will affect the rental value of the property by \$1,000 or more per 12 month period.

Regulation 18702.3(a)(3) (copy enclosed).

Thus, you must disqualify yourself from participating in any decision concerning the entire Alpha I or II project areas that could foreseeably increase or decrease the fair market value of your property by \$10,000 or more, or the rental value of your property by at least \$1,000 in a 12-month period. (Regulation 18702.3(a)(3)(A).)

We cannot determine the magnitude of the financial effect on your property that will be caused by the decisions on the Alpha I or Alpha II project areas. We must leave this factual determination of materiality to you within the guidelines provided by Regulation 18702.3. However, Regulation 18702.3(d) does set forth factors that you must consider in determining whether the decisions will have a material financial effect on the value of your real property.^{4/} You must consider the following:

1. The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which the official has an interest;

2. Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;

3. In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, the effect on

^{4/} The factors to be considered are not limited to the factors specified in Regulation 18702.3(d).

traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

Regulation 18702.3(d)

For example, even though the property that is the subject of the decision may be close to your property, if the magnitude of the proposed project or change in use in relationship to your property is relatively minor, the impact outside the project areas may also be minor. In contrast, where a decision is of substantial magnitude or involves a drastic change in use, the fact that your property is distant may mitigate against substantial effects on your property. Finally, since your property is currently used for residential purposes, you must also consider any effect on the character of the neighborhood in which your property is located with respect to traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood. All these factors should be considered in determining the financial effect decisions with respect to the project areas will cause on your real property.

Public Generally

For the public generally exception to apply, a decision must affect your interests in substantially the same manner as it would affect a significant segment of the residents and persons doing business in Irwindale. (Regulation 18703, copy enclosed; In re Owen, supra.) Where your property is between 300 and 2,500 feet of the property that is the subject of the decisions, you must show that all the properties that are roughly the same distance away from the proposed project are similarly affected and that these property owners constitute a significant segment of the population, or that the effect on the remainder of the population will be substantially the same as the effect on you. (Cosgrove Advice Letter, No. I-89-178, copy enclosed.)

The City of Irwindale is a relatively small city. It has a population of 1,030 and covers 9.5 square miles. Because the results of the test will vary depending on the specific facts of the decision, we cannot provide you with a definitive conclusion as to whether the exception would apply. Instead, we have enclosed various letters and opinions that deal with the exception and leave the factual determination as to its applicability to you and your city attorney. (In re Brown (1978) 4 FPPC Ops. 19; In re Ferraro (1978) 4 FPPC Ops 62; In re Legan (1985) 9 FPPC Ops. 1; Scher Advice Letter No. A-88-479; Cosgrove Advice Letter No. A-89-120, copies enclosed.)

Your Real Property Interests and the Stadium Decision

The third project you are concerned about involves the purchase of gravel quarry pits around your property and the

potential that one of the pits will be developed into a stadium. The purchase of the land would be governed by the regulations set forth above. You stated that the nearest boundary of the nearest gravel quarry is 1,200 feet away. Thus, you must disqualify yourself from participating in any decision regarding the purchase that could foreseeably increase or decrease the fair market value of your property by \$10,000 or more, or the rental value of your property by at least \$1,000 in a 12-month period. (Regulation 18702.3(a)(3)(A).)

However, you have also asked about later decisions concerning the construction of a stadium on one of the quarries. This presents a different situation since the proposed site is 3,000 feet south of your property.^{5/}

Regulation 18701.3(b) provides:

(b) The reasonably foreseeable effect of a decision is not considered material as to real property in which an official has a direct, indirect or beneficial interest (not including a leasehold interest), if the real property in which the official has an interest is located entirely beyond a 2,500 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision; unless:

(1) There are specific circumstances regarding the decision, its effect, and the nature of the real property in which the official has an interest, which make it reasonably foreseeable that the fair market value or the rental value of the real property in which the official has an interest will be affected by the amounts set forth in subdivisions

(a)(3)(A) or (a)(3)(B); and

(2) Either of the following apply:

(A) The effect will not be substantially the same as the effect upon at least 25 percent of all the properties which are within a 2,500 foot radius of the boundaries of the real property in which the official has an interest; or

(B) There are not at least 10 properties under separate ownership

^{5/} Provided the decision concerning the stadium and the purchase of the gravel pits are not interrelated as discussed above.

within a 2,500 foot radius of the property in which the official has an interest.

Applying the regulation, we first consider the foreseeable effects of the proposed stadium on your property. It seems likely that the construction of a major sports stadium, even 3,000 feet away from your property, will cause major changes in your property values. Although your property is currently used for residential purposes, you stated in your letter that it is zoned commercial. Property zoned for commercial use that is located so close to a major sports stadium would presumably be very valuable. While you may not intend to change the use of the property at this time, the Commission has held that the intent of the property owner at the time of the decision is not determinative of the potential financial effect of the decision on the owner's financial interest. (In re Legan, supra; Hill Advice Letter, No. A-87-110, copy enclosed.)

Consequently, because of the unusual nature of the stadium decision, it is foreseeable that the rental value of the property will be increased by \$1,000 in a 12-month period. In addition, residential property values might decrease because of the significant change in use, and the change in the character of the neighborhood with respect to traffic, intensity of use and noise levels near the stadium. Absent additional information, we conclude that the effect on your property caused by the stadium decision will be material. However, you still may participate in the stadium decision if the effect on your property will be substantially the same as the effect upon at least 25 percent of all the properties which are within a 2,500 foot radius of the boundaries of the real property you own, or there are at least 10 properties under separate ownership within a 2,500 foot radius of the property you own. (Regulation 18701.3(b)(2).) We do not have sufficient facts to apply these tests; however, the maps you provided show more than 10 parcels, which might be under separate ownership, within a 2500-foot approximately (one-half mile) radius of your properties.

Sources of Income

Currently, both of the properties in which you have an ownership interest are being leased out to produce income. Thus, your lessees are sources of income to you. Consequently, in examining the decisions that are currently before you, you must also look at the effect on the lessees to determine if a conflict of interest exists.

As discussed above in the context of your property, for a financial interest to be disqualifying, the financial effect on it must be foreseeable and material. The standard for foreseeability is set forth above. The determination of materiality varies

depending on whether the source of income is directly or indirectly involved in a decision. (Regulation 18702.1, copy enclosed.) In our telephone conversation you stated that neither lessee was directly involved in any of the proceedings coming before the city council and redevelopment agency. Consequently, you need only look to the indirect financial effect on the lessees.

Regulation 18702.6 provides:

The effect of a decision is material as to an individual who is a source of income or gifts to an official if any of the following applies:

(a) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

(b) The decision will affect the individual's real property interest in a manner that is considered material under Section 18702.3 or Section 18702.4.^{6/}

You have informed us that your lessees rent your property on a month-to-month basis. An interest in real property is defined to include any leasehold, beneficial or ownership interest or an option to acquire such an interest if the fair market value is \$1,000 or more, but excludes the interest of a tenant in a periodic tenancy of one month or less. (Section 82033; Regulation 18233, copy enclosed.) Consequently, unless your lessees own property elsewhere in Irwindale, you need only look to see if the decision will affect the lessee's income, investments, or other tangible or intangible assets or liabilities by \$1,000 or more. If the decision will not affect their assets as set forth above, you will not have a conflict of interest with respect to your lessees as sources of income.

Blind Trusts

You have asked in a separate letter (Advice Request No. A-89-437) for confirmation of telephone advice concerning blind trusts. Pursuant to our telephone conversation of July 25, 1989, this request has been consolidated with your earlier request (Advice Request No. A-89-425).

You have asked whether a blind trust managed by your niece or nephew as trustee would qualify as a blind trust under the Act.

^{6/} Regulation 18702.4 has been enclosed for your information.

Regulation 18235 (copy enclosed) provides that a blind trust must comply with the following conditions:

(1) The trustee must be a disinterested party other than the filer's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, aunt, uncle, or first cousin or the spouse of any such person;

(2) The trustees must be given complete discretion to manage the trust including, but not limited to, the power to dispose of and acquire trust assets without consulting or notifying the filer;

(3) The trustee must be required to notify the filer of the date of disposition and value at disposition of any original investments or interests in real property so that information can be reported on the filer's next Statement of Economic Interests;

(4) The trustee must be prohibited from disclosing to the filer any information concerning the replacement assets except for information required under this subsection or the minimum tax information which lists only the totals of taxable items from the trust and does not describe the source of any individual item of income; and

(5) If the trust is revoked while the filer is a public official, or if the filer learns of any replacement assets of the trust, the filer must file an amendment to the most recent Statement of Economic Interests disclosing the date of revocation and the previously unreported pro rata share of the trust's interests in real property or investments or income deriving from any such interests in real property or investments and disqualify himself or herself, as necessary. For purposes of this regulation, any replacement assets of which the filer learns shall thereafter be treated as though they were original assets of the trust.

Thus, Regulation 18235(b)(1) permits a niece or nephew to be the trustee of your blind trust, provided the niece or nephew has no interest in the trust.

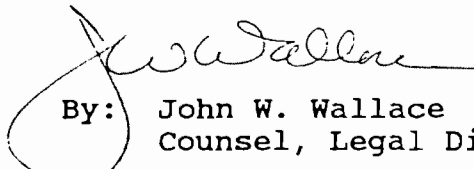
However, the creation of a blind trust will not immediately remedy the conflicts of interest that currently confront you. You are obligated to continue to disclose the original assets and any

income generated from those assets until they are disposed of by the trustee. (Epstein Advice Letter, A-84-224, copy enclosed.) Thus, if you were to create a blind trust, you will still be disqualified from participating in decisions that affect your lots until the lots are disposed of by the trustee. (Dean Advice Letter, No. A-88-425, copy enclosed.) Once the original assets are disposed of, you will no longer know or have reason to know when financial interests are involved in a decision, and therefore may participate. (Section 87100; Biddle Advice Letter, No. A-88-403, copy enclosed.)

I trust this letter has addressed your concerns. Should you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel



By: John W. Wallace
Counsel, Legal Division

KED:JWW:aa

Enclosures

FPFC
Jul 20 8 15 AM '89

5050 N. Irwindale Avenue
Irwindale, CA 91706
July 18, 1989

Fair Political Practices Commission
428 J Street, Suite 800
P. O. Box 807
Sacramento, CA 95804-0807

Gentlemen:

My name is Robert R. Diaz, and I am a council member in the City of Irwindale as well as a member of the Irwindale Community Redevelopment Agency (CRA). I need to know if I may participate and vote on some proposed projects near property which I own. Enclosed you will find some maps which may assist you in formulating an opinion. Please note that the areas known as Alpha I and Alpha II are zoned M-2, heavy manufacturing and not M-1, light manufacturing as the zoning map indicates.

The first proposed project known as Alpha II is a 27.5 acre, light industrial project within the CRA project boundaries with a total projected value of about 23 to 24 million dollars. It stands about 1200 feet to the east from two commercially zoned residentially used properties which I own. These lots adjoin each other at the rear and are ~~leased on a month to month basis as income residential~~ property. Lot 25 on the enclosed map is valued at \$165,000. Lot 39 is zoned commercial (frontage) and agricultural (rear) and is valued at \$115,000. I have a 1/3 interest in lot 39. Both of the lots are located outside CRA project boundaries, and both lots are valued at their highest use as residential property according to an appraiser. May I vote on the Alpha II project? Furthermore, may I vote on other matters within the Alpha II area?

Another situation involves a developer's proposal to acquire for development, with City assistance if necessary, about 600 acres of land of which 345 acres belongs to an active sand and gravel mining company with four quarries. The developer proposes to develop the land basically for industrial purposes and possibly includes some commercial development and a \$75 million football stadium. The stadium would be in a 75 acre pit currently owned by the sand and gravel company and is about 3000 feet to the south of my property. The mining company also owns or operates three other pits which are between 1200 and 2000 feet from my

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property and for which no specific use is proposed by the developer at this time. The nearest pit is a 100 acre pit and is about 1200 feet away from my property and is directly north of Alpha II. Another is a 115 acre pit which is 1436 feet to the south of Alpha I. Another pit south of Alpha II is 65 acres and about 2000 feet from my property. The remaining 255 acres in the developer's proposal are beyond 3000 feet.

I personally do not feel that I will benefit in any manner inconsistent with any other Irwindale property owner whether they be located within or without 1200 feet of the properties in question. But, nevertheless, I ask the following questions:

May I vote and participate on the developer's proposal?

May I vote and participate on the stadium project?

Sincerely,



ROBERT R. DIAZ

89-437

5050 N Irwindale Ave.

Irwindale, Ca. 91706

July 16, 1989

Fair Political Practices Commission

428 J St., Suite 800

P.O. Box 807

Sacramento, Ca. 95804-0807

Dear Mr. John Wallace,

I wish confirmation of my understanding of our conversation of June 23, 1989 regarding blind trusts. At that time you advised that Administrative Code Section 18235(b)(1) allows nieces or nephews to be trustees of a blind trust. Please confirm my understanding by return mail. A stamped self-addressed envelope is enclosed for your convenience.

Sincerely,

Robert R. Diaz

Robert R. Diaz

Irwindale council member